No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL FEDERATION OF OKLAHOMA, INC., OKLAHOMA CATTLEMEN'S ASSOCIATION, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, MAYES COUNTY FARM BUREAU, MUSKOGEE COUNTY FARM BUREAU, OKLAHOMA OIL & GAS ASSOCIATION, AND STATE CHAMBER OF OKLAHOMA IN SUPPORT OF PETITIONER, MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY

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The Environmental Federation of Oklahoma, Inc. (EFO), Oklahoma Cattlemen's Association (OCA), Oklahoma Farm Bureau Legal Foundation (OFBLF), Mayes County Farm Bureau, Muskogee County Farm Bureau (collectively Farm Bureau), Oklahoma Oil & Gas Association (OKOGA), and State Chamber of Oklahoma (SCO) (collectively *Amici*) submit this *amici curiae* brief in support of Petitioner, Mike Carpenter, Interim Warden, Oklahoma State Penitentiary, under Supreme Court Rule 37.[1] The Tenth Circuit Court of Appeals determined the former Creek Nation lands (former Creek territory), established by treaty in 1866, to be a reservation of the Muscogee (Creek) Nation (Nation), never disestablished by Congress. That decision upends over a century of criminal, civil, and regulatory jurisdictional understandings in Oklahoma and ignores long-settled expectations, threatening economically destructive confusion and controversy regarding sovereign rights in Oklahoma. *Amici*'s members are engaged in many of the same activities that helped develop the new State of Oklahoma in the early Twentieth Century, activities governed by Oklahoma law (unless on tribal trust, or, possibly, allotted lands): farming, ranching, oil and gas development, and small and large business operations. They have invested their time and money into their livelihoods, in reliance on the commonly shared understanding of the regulatory, tax, and adjudicatory authority under which they live and operate.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

If not reversed, the decision will cause uncertainty as a new jurisdictional order is imposed. The geographic scope of the former Creek territory covers large portions of Eastern Oklahoma, including much of the city of Tulsa. The decision threatens to authorize tribal taxation of activities and properties, to invest tribal courts with broader jurisdiction, and to authorize greater, and potentially exclusive, tribal and federal regulation over lands and energy resource development. Because the histories of the Cherokee, Chickasaw, Choctaw, and Seminole Tribes or Nations, the other four of the Five Civilized Tribes, are similar in important respects to that of the Nation, the decision may cause redrawing of jurisdictional boundaries across the Eastern half of Oklahoma that was, from 1890 to 1907, the Indian Territory.

INTERESTS OF *AMICI CURIAE*

Amici and their members are affected by the decision below because their members live, own businesses, and have invested in Eastern Oklahoma. *Amici* are non-profit associations or foundations whose members reside or own and operate businesses in the former Creek territory and within areas the decision may imply lie within reservations of others of the Five Civilized Tribes. The decision places at risk long-held understandings regarding the governmental entities with adjudicative, regulatory, and legislative jurisdiction over *Amici*'s members, their businesses, and their investments.

A. Environmental Federation of Oklahoma, Inc.

EFO is a non-profit corporation providing Oklahoma companies with a voice in the formulation of state and federal environmental laws, regulations, and policies.

Its membership includes over eighty company, affiliate, associate, and appendix affiliate members. EFO works to ensure that environmental regulations are clear and consistent and properly balance the need for environmental regulation with the interest of responsible economic growth. EFO members' interests in predictable regulation, consistent with their investments in reliance upon State regulation, will be hurt by the decision if the Nation or the federal government seeks to impose tribal or federal regulations, including, if permitted, environmental regulation, over the activities of non-tribal members on fee-owned lands now within the former Creek territory, or, potentially, that formerly held by the Five Civilized Tribes.

B. Oklahoma Cattlemen's Association

OCA, a non-profit association, was chartered on March 6, 1950, by a small group of cattle raisers in Seminole County. Today, the OCA includes cattle raising families in all 77 Oklahoma counties. Within the former Creek territory, OCA is affiliated with local county Cattlemen's organizations in all counties except Tulsa. Representing thousands of cattle raising families, OCA's primary work on behalf of its members promotes private property rights, natural resource stewardship, and common sense business policy. OCA is the trusted voice of the Oklahoma cattle industry and exists to support and defend the State's beef cattle industry. The decision threatens to subject members' families and businesses to new and unplanned-for jurisdictional burdens.

C. Oklahoma Farm Bureau Legal Foundation and Muskogee and Mayes County Farm Bureaus

OFBLF is a non-profit foundation, incorporated in 2001, that supports the rights and freedoms of farmers and ranchers in Oklahoma, by promoting individual liberties, private property rights, and free enterprise. OFBLF's sole member is the Oklahoma Farm Bureau, Inc. (OKFB), an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. OKFB has 82,712 members, representing agricultural producers who grow a variety of crops and livestock, and every size of operation, from small family farms to large commercial ranches and farms. Muskogee and Mayes County Farm Bureaus (together with OFBLF, Farm Bureau) are county affiliates of the OKFB. Muskogee County's 2,019 members farm hay, soybeans, and wheat, and raise laying hens and cattle. Mayes County's 1,111 members primarily farm soybeans, hay, and wheat, and raise cattle and broilers. Farm Bureau's mission is to improve the lives of rural Oklahomans by analyzing their problems and formulating action to achieve educational improvement, economic opportunity, social advancement, and to promote the general well-being of the United States. It is non-partisan and non-sectarian.

A significant number of OKFB's members are in counties that are fully or partially within the former Creek territory: as of July 23, 2018, 13,498 OKFB member families are in Creek, Hughes, McIntosh, Mayes, Muskogee, Okfuskee, Okmulgee, Rogers, Seminole, Tulsa, and Wagoner Counties. While some of Farm Bureau's members may also be Nation members or members of others of the Five Civilized Tribes, Farm Bureau members who are not tribal

members will lack political or legal remedies to address potential grievances caused by new Nation, Five Civilized Tribe, or federal assertions of legal, taxation, regulatory and adjudicatory jurisdiction, grounded in previously unheralded reservation status of the former Creek territory.

D. Oklahoma Oil & Gas Association

OKOGA was formed in 1919 as the Mid-Continent Oil and Gas Association, and is one of the oldest oil and gas industry associations in the United States. OKOGA is a non-profit association composed of oil and natural gas producers, operators, purchasers, pipelines, transporters, processors, refiners, marketers, and service companies which represent a substantial sector of the oil and natural gas industry within Oklahoma. OKOGA's membership also includes the state's largest pipeline, gathering, and processing companies, and all four refiners in the state.

OKOGA addresses industry issues of concern and works toward the advancement and improvement of the domestic oil and gas industry. The activities of OKOGA include support for legislative and regulatory measures designed to promote the well-being and best interests of the citizens of Oklahoma and a strong and vital petroleum industry within the State and throughout the United States. Members of OKOGA own or operate oil and gas operations in the counties within the former Creek territory, and within former territories of others of the Five Civilized Tribes. The decision impairs their interests in stable and predictable regulation and taxation, consistent with the expectations supporting their investments.

E. State Chamber of Oklahoma

SCO is Oklahoma's statewide chamber of commerce. It represents over 1,500 Oklahoma businesses and their 350,000 employees. It has been the State's leading advocate for business since 1926. SCO provides a voice for Oklahoma businesses and their employees to the executive, legislative, and judicial branches of government, and is in a unique position to advise the Court of the impact of the civil implications of the regulatory, taxation, and economic development consequences of the decision on its members' interests, and its potential effect on business development within the former Creek territory.

SUMMARY OF ARGUMENT

This brief offers three primary arguments to assist the Court in ruling on the issues raised in this case. First, the brief discusses the potential civil jurisdictional consequences if the decision below is affirmed. Second, the brief explores whether the Tenth Circuit was correct in applying the *Solem v. Bartlett*, 465 U.S. 463 (1984), test to the Nation, as dismantlement of the Nation's landholdings and most government functions was not accomplished by a surplus land act. Third, the brief argues that the decision below erred in its application of *Solem*, ignoring Congress' unambiguous intent as expressed in statutory language, contemporaneous understanding of the effects of Congressional acts, and later understanding of government authority in Eastern Oklahoma.

ARGUMENT

Amici are Oklahoma farmers, ranchers, oil and gas developers, and business owners; they and others in similar businesses developed Oklahoma. Some have interests dating to the days when what is now Eastern Oklahoma was the Indian Territory. All are regulated by, comply with laws promulgated by, and pay taxes to the State of Oklahoma, its counties and municipalities, and, where relevant, the United States, and have done so since Statehood in 1907. While acknowledging the unique, and sometimes troubled, history of the former Oklahoma Indian Territory, none of *Amici* or their members have ever believed they were living, working, or owning businesses or land within the boundaries of a current Native American reservation—until the decision below issued. If not reversed, the decision could damage *Amici*'s member businesses and families, and the business and legal environment in the Nation's pre-Statehood territory, and overturn expectations across the lands of the others of the Five Civilized Tribes.

I. THE TENTH CIRCUIT FAILED TO ADDRESS THE FUNDAMENTAL CIVIL JURISDICTIONAL CONSEQUENCES OF ITS DECISION.

The decision below has direct and staggering consequences to criminal jurisdiction in Eastern Oklahoma. Just as confounding are the civil consequences that will directly affect *Amici* and their members. Equally troubling is that the Tenth Circuit reached its conclusion without addressing Oklahomans' reliance on longstanding understandings and expectations regarding, or the effect of its ruling on, civil jurisdiction. If allowed to stand, the ruling provides a basis for the Nation, and potentially the others of the

Five Civilized Tribes, to assert tax and regulatory jurisdiction, and for the tribes, and their members by suing in tribal court, to assert adjudicatory jurisdiction over *Amici*'s member families, businesses, and property. This potentially duplicative and inconsistent regulation and jurisdiction undermine legal foundations underlying private property and investment, creating significant risk and uncertainty for people and businesses.

A. The decision threatens to substantially enlarge tribal civil jurisdiction over nonmembers in Eastern Oklahoma.

In an area where most residents and business owners are not members of the Nation (or the other Five Civilized Tribes), and where most land is owned in fee by nonmembers, the decision's civil regulatory effects are profound. Tribes lack civil jurisdiction over nonmembers on private fee lands outside of the tribe's Indian country. Federal law defines "Indian country" as including "all land[s] within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Federal law considers "Indian country" status pertinent—or sometimes dispositive—both under federal common law defining whether tribal (and federal) or state powers apply, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (stating "Indian country" "also generally applies to questions of civil jurisdiction"), and by express delegation employing the term, *see Rice v. Rehner*, 463 U.S. 713, 733 (1983) (in 18 U.S.C. § 1161, "Congress intended to delegate a portion of its authority to the tribes"). The determination that a geographic area is an Indian reservation has significant civil jurisdictional effect.

Cf. United States v. Mazurie, 419 U.S. 544, 557 (1975) (Indian tribes retain "attributes of sovereignty over both their members and their territory").

Reservation status, even without specific statutory reference to "Indian country," also can support tribal jurisdictional assertions. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) (prescribing two exceptions to its general rule that tribes lack jurisdiction over nonmember activities on fee lands within reservations). *Montana*'s exceptions extend on-reservation tribal jurisdiction to nonmembers, even on fee lands, "who enter consensual relationships with the tribe or its members" and to those whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* The Nation's claim of "political jurisdiction" will potentially affect civil jurisdiction over the entirety of the former Creek territory. *See* Constitution of the Muscogee (Creek) Nation, art. I, § 2 (1979) ("The political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America . . . ."). Reservation-based civil jurisdiction can extend to taxation, regulation, and court jurisdiction, or can be imposed by express federal delegation over reservation or Indian country lands. The tribal or federal authorities that may be asserted over the former Creek territory by the Nation or the United States are wide-ranging and would affect the lives and businesses of *Amici* and their members.

B. The decision threatens Oklahoma citizens and businesses with tribal taxation.

The decision threatens *Amici* with tribal taxation of nonmembers' fee land property and activities in

certain circumstances.[2] *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (rejecting tribal taxation, but stating Navajo Nation tax on hotel receipts could apply if either *Montana* exception established); *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (tribe entitled to discovery on whether it could impose *ad valorem* property tax under the *Montana* exceptions on federally-granted right-of-way, the equivalent of fee lands, on reservation). The decision might also subject *Amici* to dual state and tribal taxation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (approving state severance tax where tribal severance taxes imposed); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982) (tribe may tax on-reservation oil and gas production). For example, Farm Bureau's members are subject to Oklahoma taxation of their agricultural lands and operations, but their livestock feed, machinery to operate a farm or ranch, and other items are exempt from State sales tax. *See* 68 Okla. St. Ann. § 1358. In a historically low-margin industry, any additional taxes would be onerous. The decision threatens to expose *Amici*'s members to an additional tax burden.

C. The decision threatens Oklahoma citizens and businesses with dispute resolution in tribal courts.

The decision potentially subjects fee lands and non-member activities within the area to tribal adjudicatory jurisdiction. *See Strate v. A-1 Contractors*, 520

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[2] The MCN Tax Code asserts a sales tax, 36 M(C)N Code § 4-101-4-110, a liquor sales tax, 36 M(C)N Code § 7-501, and a cigarette tax, 36 M(C)N Code § 5-108, among other taxes.

U.S. 438, 458 (1997). Determining whether federal law permits tribes to assert jurisdiction over nonmember activities on reservation fee lands requires application of the two fact-based and highly subjective exceptions prescribed by *Montana*, which frequently must first be addressed in tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2159 (2016) (per curiam) (finding tribal court jurisdiction existed based on a consensual relationship). The Nation asserts its courts have jurisdiction over nonmembers.[3]

To whatever degree dispute resolution shifts to tribal forums, nonmembers enjoy no right to federal court review of deprivations of due process or other civil rights under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (ICRA). *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *see also Nevada v. Hicks*, 533 U.S. 353, 383-384 (2001) (Souter, J., concurring) ("[T]here is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the Supreme

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[3] The Nation's Judicial Code provides, "Personal jurisdiction shall exist over all defendants, regardless of the Indian or non-Indian status of said defendants, in cases arising from any action or event within the Muscogee (Creek) Nation Indian country" and "[r]esiding[,] conducting business, using roadways or engaging in any other activity within the Muscogee (Creek) Nation Indian Country is deemed consent to Muscogee (Creek) Nation jurisdiction." 27 M(C)N Code § 1-102(B). It defines the "territorial jurisdiction of the Muscogee Courts" to include "all the territory defined in the 1866 Treaty with the United States, including without limitation any real property within the Nation's political jurisdiction as defined in Article I, Section 2 of the 1979 Muscogee (Creek) Constitution." *Id.* (A).

Court precedents jot for not.") (quotation marks and citations omitted). If the decision below is not reversed, *Amici*'s members may be required to exhaust their remedies in tribal courts or to litigate there without right of federal or state court review. The decision threatens burdening *Amici*'s members with risk, delay, and expense in lawsuits in Eastern Oklahoma.

The Nation is preparing to exercise its jurisdiction over millions more individuals and businesses. *See* Jason Salsman, *With Murphy decision looming, LTPD [Lighthorse Tribal Police Department] travels to observe Navajo police*, Mvskoke Media, April 19, 2018, https://mvskokemedia.com/with-murphy-decision-looming-ltpd-travels-to-observe-navajo-police/. Whether the Nation's courts can handle hundreds, if not thousands, more cases from across the former Creek territory remains unknown. Further uncertainty would arise if the decision were extended to all the Five Civilized Tribes.

D. The decision threatens Oklahoma citizens and businesses with tribal regulatory jurisdiction.

The decision threatens to subject nonmember residents and businesses in the former Creek territory to other forms of Nation's regulatory jurisdiction. *See Montana*, 450 U.S. at 566; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989) (White, J.) (plurality opinion) (tribe may zone nonmember fee land in portion of reservation); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (holding tribe had jurisdiction to enforce tribal employment ordinance on nonmember employer operating a plant on non-Indian land within the reservation based on employment

agreements with the tribe); *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-cv-00489-BLW, 2017 WL 4322393 (Sept. 28, 2017), *appeal docketed*, No. 17-35865 (9th Cir.) (filed Oct. 24, 2017) (tribal court has jurisdiction to enforce environmental fee agreement against nonmember company on fee lands within reservation).

By way of example, the Nation requires any "person desiring to engage in the business of selling goods or items of value within the Muscogee (Creek) Nation territorial jurisdiction" to secure a vendor's sales license, 36 M(C)N Code § 4-107(A), and to pay sales tax, 36 M(C)N Code § 4-103. The Nation issues licenses to sell cigarettes and tobacco "within the Muscogee (Creek) territorial jurisdiction," 36 M(C)N Code § 5-112(A), and requires the payment of Nation-imposed taxes on cigarette sales, 36 M(C)N Code § 5-108. Failure to collect and pay such taxes subjects the vendor to penalties. 36 M(C)N Code § 4-110(A-C). Certainly thousands of vendors must address these additional burdens and concomitant risks. Any such authority would be subject to the fact-dependent application of the two *Montana* exceptions. *See Montana*, 450 U.S. at 566.

In addition, the determination that the Nation has a continuing reservation may trigger claims under the federal common law reserved water rights doctrine, for a large reservation long-ago deemed extinguished, presenting resource uncertainty and possibly hardship for *Amici's* members. *See Winters v. United States*, 207 U.S. 564, 576 (1908); *see also Osage Nation v. Irby*, 597 F.3d 1117, 1124 (10th Cir. 2010) (stating Congress "disestablished the Creek and other Oklahoma reservations").

E. Federal authority delegated to tribes may oust state regulation.

Federal delegations of authority to tribes also threaten to shift regulatory jurisdiction to the Nation. As one example, federal law provides tribal regulations may govern the sale of alcohol by restaurants and stores within "Indian country." See *Mazurie*, 419 U.S. at 558 (interpreting 18 U.S.C. § 1161). Consequently, the decision would have the effect of the Omaha Tribe ordinance in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), not just for a small village, but affecting establishments across major portions of Eastern Oklahoma and the State's second largest city, Tulsa. It would prohibit the sale of alcoholic beverages within the Nation's Indian country without a license issued by the Nation's National Council under its federally approved Liquor and Beverage Code. *See* 73 Fed. Reg. 14997-02 (March 28, 2008); 36 M(C)N Code § 7-302(A).

For businesses that now find themselves within the reservation identified by the decision, obtaining federal permits, licenses, or other authorizations may require government-to-government consultation between tribes and the federal government. Under the National Historic Preservation Act § 106 process, consultation with tribes and affected communities is required for any federal approval potentially affecting historic properties on "tribal land," defined, in relevant part, as "all land within the exterior boundaries of any Indian reservation." 54 U.S.C. § 300319. *Amici* do not dispute that government-to-government consultation is appropriate for actions directly affecting tribes and their lands, but the decision threatens to expand that requirement to nonmember activities requiring federal permission across most of Eastern Oklahoma. With the consultation requirement comes

additional expense, delay, and possible imposition of conditions upon any federal approval required for any development project.

While tribes or their members may not prevail in some jurisdictional assertions, the Tenth Circuit's failure to address the profoundly unsettling effect of its decision requires reversal.

II. THE TENTH CIRCUIT INCORRECTLY RELIED SOLELY ON INDICIA APPLICABLE TO SURPLUS LAND ACTS UNDER *SOLEM V. BARTLETT* TO ASSESS CONGRESS' FAR MORE IMPACTFUL ACTIONS DIVESTING THE NATION OF ITS GOVERNMENTAL AUTHORITY *AND* LAND OWNERSHIP IN PREPARATION FOR STATEHOOD.

This Court's decision in *Solem v. Bartlett* recognizes an over-riding principle that Congress can unilaterally reduce the size of a Native American reservation. *Solem* lays out a three-part test to guide the application of that principle in assessing whether Congress "diminished" a Native American reservation when it enacted "*surplus land acts* at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." 465 U.S. at 467 (emphasis added); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) ("The underlying premise is that congressional intent will control."); *DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 444 (1975) ("The congressional intent must be clear . . . ."); *United States v. Celestine*, 215 U.S. 278, 290 (1909) ("[C]ourts may wisely insist that the purpose of Congress be made clear by its legislation but, when that purpose is made clear, the question is at an end.").

Concerning the former Creek territory, Congress enacted a series of statutes to prepare the Creek Nation and the Five Civilized Tribes for the divestiture of tribal lands and unqualified incorporation into the Oklahoma Territory, and ultimately the State of Oklahoma. The series of statutes did not merely allow for the transfer of tribal lands. Congress *both* divested the Creek Nation of title to essentially all of the lands comprising the former Creek territory, transferring the lands to individual Creek members as allotments, *and* stripped the Creek Nation of all vestiges of governmental authority, including the powers to tax, regulate, or resolve disputes throughout the former Creek territory. The history of the Creek Nation and the former Creek territory makes strict application of *Solem* inapposite to determining, as the Tenth Circuit did, which sovereign has authority over a specific plot of land. However, even under a discerning application of *Solem*, there is a compelling showing of disestablishment.

A. The Tenth Circuit ignored the inapplicability of cases applying *Solem*'s test, addressing acts divesting tribes only of land, to the wholesale divestiture of the Nation's tribal authorities and lands.

Solem addressed the effect of the Cheyenne River Act, Act of May 29, 1908, ch. 218, 35 Stat. 460, which "authorized and directed [the Secretary of the Interior] to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota" within certain described areas. 465 U.S. at 472-73. It reviewed cases interpreting "surplus land acts," statutes passed in the late Nineteenth and early Twentieth

centuries "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Id.* at 467. In each case *Solem* analyzed, Congress had created a reservation for the tribe, the lands in all or a portion of the reservation were allotted and the remainder sold or "opened for settlement and entry," but the tribe's government remained in place and retained all governmental powers over remaining tribal lands and allotments. *See DeCoteau*, 420 U.S. at 442 (following allotment, Lake Traverse Band shall "cede, sell, relinquish, and convey . . . all the unallotted land within the reservation"); *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962) (after allotments issued, unallotted "surplus lands" patented as homesteads and opened for mineral entry); *Mattz v. Arnett*, 412 U.S. 481, 495 (1973) (Klamath River Reservation lands declared "subject to settlement, entry, and purchase under [federal homestead and mineral entry laws]" after issuance of allotments) (quotation marks and citations omitted).

These and other statutes are appropriately called "surplus land acts" because they affected tribal *lands*, and only tribal lands, leaving tribal government and its authorities whole and intact with respect to the reduced tribal and/or allotted lands. Consequently, the cases turned on Congress' expressions regarding the manner in which Congress "opened lands" or affected "reservation boundaries." The Court has not had the occasion to consider the confluence of actions divesting a tribe of its lands while stripping the tribe of its sovereign powers on any remaining tribal or allotted lands by transferring authority to a state. As the State of Oklahoma develops in its brief, questions exist whether *Solem* should apply at all to Mr. Murphy's challenges to his conviction. *See* Brief for Petitioner 46 (July 23, 2018).

The series of acts applicable to transitioning the Creek lands to readiness for Statehood cannot be shoehorned into a surplus land act pattern. The acts divested the Nation of essentially all tribal lands, stripped the tribal government of all legislative and taxing authority, divested tribal courts of all jurisdiction over all persons, "regardless of race," and transferred the divested authority entirely to the new State of Oklahoma. The Tenth Circuit failed to consider that no similar pattern applied to the surplus land acts cases.

The decision disregards that the 1893-1906 Congresses addressing the Nation unfailingly prescribed the fundamental criteria of non-reservation status, and did not merely address surplus lands after allotment: divestiture of all communal tribal title and authority on all lands within the former Creek territory. *See* Act of March 3, 1893, ch. 209, 27 Stat. 612, 646, (authorizing allotment of Five Tribes' lands, § 15, for the "purpose of the extinguishment of the national or tribal title to any lands within [Indian] Territory," expressly "to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a state of the Union," § 16); Act of June 7, 1897, ch. 3, 30 Stat. 62, 83-84 ("the United States courts . . . shall have original and exclusive jurisdiction . . . [over] all civil . . . and all criminal causes [in the Indian Territory] . . . irrespective of race," and any "acts, ordinances, and resolutions of the Council of [any] of the Five Tribes" shall be subject to disapproval by the President); Curtis Act, ch. 517, 30 Stat. 495, 504-505 (June 28, 1898) (prohibiting enforcement of Five Tribes laws in United States courts in the Indian Territory, § 26, abolishing all tribal courts in the Indian Territory, and transferring all causes pending in any tribal court "to

the United States court in said Territory," § 28); Act of March 1, 1901, ch. 676, 31 Stat. 861 (1901 Act) (approving the First Creek Agreement, providing "all lands of [the Creek Nation] shall be allotted among the citizens of the tribe," § 8; providing for townsites, § 10; providing Creek national council acts or ordinances could pertain only to tribal or allotted lands or tribal members—and only if approved by the President, § 42; and disclaiming the Agreement could "revive or reestablish the Creek courts which have been abolished by former Acts of Congress," § 47); Act of June 30, 1902, ch. 1323, 32 Stat. 500, § 6 (1902 Act) (approving the Second Creek Agreement, replacing Creek law of descent and distribution with Arkansas law, § 6; providing for the Dawes Commission, not the Creek Nation, to determine roles establishing membership and entitlement to allotments, § 9; and providing all residual funds of the Creek Nation not needed for allotment purposes be paid out ratably to its members, § 14); Five Tribes Act, ch. 1876, 34 Stat. 137 (April 26, 1906) (requiring Secretary to assume control of tribal revenues, schools, § 10; limiting terms of councils and requiring President's approval of all ordinances, § 28). Finally, the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, § 13 (June 16, 1906), extended the laws of the Territory of Oklahoma to all portions of the new State.

The series of statutes relating to the Creek Nation and the creation of the State of Oklahoma divested the Nation of all recognized tribal governmental powers, including providing exclusively for Territorial and State law and non-tribal courts, and transferring almost all lands from tribal to allotted ownership and, ultimately, to nonmembers. Those acts both 1) unambiguously contemplated the termination of any prior reservation status of the subject lands, and 2) provide powerful contemporaneous evidence Congress intended

to terminate. *See Rosebud Sioux Tribe*, 430 U.S. at 604-606. The decision's unexamined insistence on facts from settings far different from Eastern Oklahoma history led it to ignore compelling expressions of Congressional intent. Congress allotted substantially all Creek lands to members, contemplating the widespread transfers to nonmembers that ensued, with the intent that all would reside—and do business—in Oklahoma, a non-reservation environment.

Instead, the decision emphasizes immaterial factors: whether the Creek Nation's tribal existence was terminated, Pet. App. 96a-98a; whether the Creek Nation retained jurisdiction over tribal or trust or restricted allotted lands, *id.* 105a-107a; and whether the United States continued to discharge trust responsibilities over tribal or allotted trust or restricted lands, *id.* 102a-103a. But, those facts existed in every case in which this Court found disestablishment or diminishment. *See, e.g.*, *Rosebud Sioux*, 430 U.S. at 604. In ignoring the plain Congressional intent and history unique to the Nation, the Tenth Circuit misapplied *Solem*.

B. Even if *Solem* provides the correct analysis, the Tenth Circuit erred in its analysis at each of the *Solem* steps.

1. Insisting on surplus land act "hallmarks" of disestablishment, the Tenth Circuit misapplied *Solem* step 1.

The Tenth Circuit never addressed whether the series of statutes effecting the wholesale transfer of tribal governmental authority to a State, in tandem with the divestiture of nearly all tribal lands, supplied the requisite unambiguous intention to terminate the

Creek reservation. Congress frequently expressed intent on a single reservation in multiple allotment era statutes. The statutes in this case evolved in an era when ongoing and evolving policies worked to the end that "the Indians be gradually assimilated to and merged into the body of citizens," Francis Paul Prucha, *The Great Father*, Vol. II 692 (1984). Local public pressures, the pace of tribal negotiations, and lengthy legal developments frequently figured in Congress' patchwork approach to addressing specific tribal governments and reservations. Such incremental federal action is reflected in the history of the Creek Nation and the Five Tribes. As summarized by Prucha, perhaps the leading historian of federal Indian policy, the Five Civilized Tribes, "who had advanced the furthest along the white man's road . . . seemed [to white reformers] most apt for final absorption into American society as individualized, landholding citizens." *Id.* at 736. Congress extended federal authority and reduced tribal powers during the 1890s and early twentieth century toward "dissolution of the tribal governments." *Id.* at 748. However, the Five Tribes resisted over many years. *Id.* at 750-756. Finally, the Tribes "made a valiant attempt to preserve their identity within the federal system by promoting separate statehood for the Indian Territory," advocating a state of Sequoya, but that proposal was "blocked in Congress," resulting in the Oklahoma Enabling Act of 1906. *Id.* at 756. As a result, "The Indians of Oklahoma were an anomaly in Indian-white relations. . . . There are no reservations in Oklahoma, however, and the reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." *Id.* at 757. The Tenth Circuit, in seeking "hallmark" indicia of disestablishment in each of the several statutes, examined

seriatim, *see* Pet. App. 75a-96a, misunderstood this history and the Court's guidance in relying upon "[n]o hallmarks of disestablishment or diminishment," *id.* 96a.

This Court, however, has recognized the unambiguous intent expressed in multiple statutes affecting a specific reservation over the period of deliberations and negotiations. In *Rosebud Sioux Tribe v. Kneip*, the Rosebud Sioux Tribe sued to "obtain a declaratory judgment that the original boundaries of their reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been diminished by three subsequent Acts of Congress passed in 1904, 1907, and 1910 . . . ." 430 U.S. at 585. In its conclusion, the Court left no doubt it analyzed all three acts and their interplay to ascertain congressional intent: "We conclude that the Acts of 1904, 1907, and 1910 did clearly evidence congressional intent to diminish the boundaries of the [reservation]." *Id.* at 587. Indeed, "[b]ecause of the history of the 1901 Agreement, the 1904 Act cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the [reservation]." *Id.* at 592; *see also Hagen v. Utah*, 510 U.S. 399, 403-406, 415 (1994) (legislation about the Uintah Reservation enacted in 1902, 1904, and 1905 "must . . . be read together").

It did not create ambiguity that Congress' intent concerning the Creek Nation (and the Five Tribes) was expressed in statutes all having the same purpose: terminating tribal authority and vesting all authorities in Territorial government and, ultimately, the new State. As delineated at Point II.A., *supra*, though certain of Congress's actions directly addressed the Creek Nation, others addressed the Five Tribe, and the Oklahoma Enabling Act completed incorporation

of the former Indian Territory into the State, all seek the same end articulated in 1893: "the extinguishment of the national or tribal title to any lands. . . [and] ultimate creation of a Territory of the United States with a view to the admission of the same as a state of the Union." Act of March 3, 1893, §§ 15-16.

The decision mechanically applied the *Solem* framework, erring in its application by concluding Congressional intent to disestablish can *only* be found where terms it deemed required—and specific statutory language—is contained in a single statute. *See* Pet. App. 107a (stating the analyzed statutes "lack any of the 'hallmarks of diminishment'" (quoting *Parker*, 136 S. Ct. at 1079)). Although it denied doing so, the decision sought to find "magic words" in a single Congressional act, and held Congress had failed to meet the decision's created test for reservation disestablishment. *See* Pet. App. 101a. *Solem* imposed no such textual straight-jacket, and this Court has never mandated such a narrow and rigid test for determining Congressional intent. Statutory text "consists of words living 'a communal existence,' . . . the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941)). "Under settled principles of statutory construction," statutes that are "*in pari materia*—that is, pertain to the same subject— . . . should . . . be construed 'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845)); *see also Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 390 (1976) (reading statutes relating to

jurisdiction over tribes and tribal members by applying the *in pari materia* doctrine).

The Tenth Circuit's decision discarded its earlier opinion in *Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011), a highly relevant precedent. *See* Pet. App. 61a. *Irby*, on a substantially similar historical record, found disestablishment when the relevant statutes "did not directly open the reservation to non-Indian settlement." 597 F.3d at 1123. *Irby* observed that Congress "disestablished the Creek and other Oklahoma reservations." *Irby*, 597 F.3d at 1124. By failing to read and construe together the long line of Congressional acts to terminate the Creek government and end any tribal authority over people and lands in the new State, the decision ignored this Court's longstanding teachings as well as its own precedent.

Enactments affecting the Creek Nation, and the Five Civilized Tribes, are largely unique within Indian history, as they *both* divested tribal government of tribal lands *and* transferred governmental authorities from tribal hands to a newly created State. *Amici*'s members and other nonmembers who moved into the former Creek territory to occupy the increasing percentages of private land would have understood that federal law made sure law, taxation, and dispute resolution all were exactly as they would find them elsewhere in Oklahoma. The combined effects of divestitures of tribal power *and* lands could not fall farther from the rationales of leading surplus land act cases, "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government . . . regarded as beneficial to the development of its wards."

Seymour, 368 U.S. at 356; *accord*, *Mattz*, 412 U.S. at 497.

2. Contemporaneous understandings the Creek reservation was terminated led to *Amici*'s members' living, working, and doing business in the former Creek territory.

Even if the legislative language of the relevant acts were ambiguous, despite their consistent goals and expressions, *Solem* step two directs a review of the "events surrounding the passage of a surplus lands act" to determine whether they "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation . . . ." 465 U.S. at 471. The historical record establishes that the United States, the Nation, and knowledgeable participants uniformly believed that, on Statehood, the former Creek (and Five Tribes) territory no longer existed as a reservation, and the Nation, its members, and nonmembers living and doing business did so in a non-reservation area subject to Oklahoma law, taxation, and courts.

Before Statehood, Creek members could lease tracts from the Nation of the commonly-owned former Creek territory for an annual rental fee, and then lease the land out, at a profit, to nonmember ranchers. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 15 (Princeton Univ. Press, 4th ed. 1991). After Congress divested the Nation of most of its land ownership, however, and vested the new State of Oklahoma with jurisdiction over land not allotted to individual members or reserved to the Nation, nonmembers could purchase or lease ranching land from any allottee landowner. The Nation received no benefit from nonmember ranching on the former

territory. *See Groom v. Wright*, 121 P. 215, 219 (Okla. 1912) (holding Congress permitted allottees to lease their land for farming or grazing purposes, "to thus encourage the development of the country, and at the same time to yield a return to the allottee. Such has been the manifest purpose of the federal government in bringing about a change in both the land tenures and forms of government among the members of the Five Civilized Tribes").

Oil development in the former Creek territory began in 1901, but was limited until the 1902 Act, giving the United States control over mineral development. *See* Debo, *And Still*, 86-87. At Statehood, however, authority over oil and gas development transferred to Oklahoma, except on trust lands requiring a federally approved lease. The Oklahoma Corporation Commission was established in 1907, Okla. Const. Art. IX, to regulate businesses essential to the public welfare, including transportation, transmission, and communication companies. In 1915, the Oklahoma Legislature extended the Corporation Commission's jurisdiction to include authority over oil and gas exploration and extraction. 52 Okla. St. Ann. § 243. Shortly after Statehood, a single state entity exercised regulatory jurisdiction over companies involved in the same business as OKOGA's members, and some of the State Chamber's members, today. Any federal or tribal authority was applied only to tribal lands. Had contemporaneous Oklahomans, the Nation, or the United States understood the Nation to retain regulatory jurisdiction over all of its historical territory, the state-wide assertion of that authority would not be expected.

In addition, the courts of the new state of Oklahoma exercised jurisdiction over disputes arising from oil

and gas leases on land within the former Creek territory. *See, e.g., Eldred v. Okmulgee Loan & Trust Co.*, 98 P. 929 (Okla. 1908). Such exercise of jurisdiction would have contravened any contemporary understanding that the Nation retained jurisdiction over the surface and minerals of its former territory. *See* Okla. Enabling Act, 34 Stat. 267, § 8 (granting the State authority over all minerals, gas, and oil under lands granted to the State).

Before the passage of the Five Tribes Act, the Nation, like the other Five Civilized Tribes, could tax development within its territory, including grazing, mining, and businesses. The Five Tribes Act, however, abolished the right of the Nation to collect taxes from nonmembers. 34 Stat. 137, §§ 10, 16; *see also* Debo, *And Still*, 65-66, 81-82. The Oklahoma Constitution granted the State the authority to tax all property except "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws." Okla. Const. Art. X, § 6; *see* Okla. Enabling Act, 34 Stat. 267, § 25, 2nd (exempting from State taxation only lands held by the United States or allotments subject to restriction). With the Act of May 27, 1908, §§ 6, 8, 35 Stat. 312, the United States authorized early lifting of restrictions on the conveyance of allotments, expanding the lands subject to Oklahoma's taxation authority. *See Fink v. Bd. of Comm'rs of Muskogee Cty.*, 248 U.S. 399, 404 (1919); *Bartlett v. United States*, 203 F. 410, 412 (8th Cir. 1913) ("As soon as the title, both legal and equitable, to the land in question became vested in [the allottee], it was subject to taxation by the state and county authorities . . . .").

When Oklahoma became a state, it was widely understood that Oklahoma, and not tribes or the federal government, would exercise regulatory and adjudicatory jurisdiction over nonmembers and all land not otherwise held by the United States, expressly granted to a tribe, or held in allotment subject to restriction. The decision below erred in ignoring the contemporaneous understanding of the effects on tribal jurisdiction at Oklahoma's Statehood. First, the decision's conclusion that the pre-1901 legislative history did "little to advance the analysis because the State does not dispute that the reservation was intact in 1900," Pet. App. 109a (quotation marks, citation omitted), ignores the intent to disestablish the Creek Nation reservation expressed in the pre-1901 Acts remained and was executed by the 1901 and 1902 Acts and confirmed in the Five Tribes Act and other 1906 legislation, including the Enabling Act. Congress' pre-1901 enactments, and their legislative histories, declared the policy of the United States toward the Five Civilized Tribes, which, for the Creek, led to the Agreements confirmed by enactment of the 1901 and 1902 Acts. Consequently, the pre- and post-1901 evidence demonstrate a continuity of purpose that the decision minimized or ignored.

Second, and contrary to the decision's limited review, the legislative histories of the acts reflect Congress' goal was to transfer jurisdiction from the Creek Nation to the State, abolish communal landholdings and allow transfers of allotments, and subject all such lands and residents to State law and courts, a goal entirely inconsistent with continued reservation status. *See, e.g.*, *United States v. Hayes*, 20 F.2d 873, 879-880 (8th Cir. 1927) (reviewing, as relevant to the Creek government, the "course of legislation, from its beginning to its end," and concluding its "main purpose was

to do away with the tribal governments"); H.R. Rep. No. 57-2495, 1 (June 14, 1902) (Committee on Indian Affairs report discussing the 1902 Act, stating it "will permit the Government to close up the affairs of the Creek tribe of Indians, make all of their allotments, and finish the work of the Dawes Commission in said nation . . . ."). The decision did not consider thoroughly the legislative histories demonstrating Congress intended to disestablish the Creek Nation "reservation" and substitute State criminal, civil, taxing, and adjudicatory jurisdiction and individual land ownership. The contemporary understanding of the Nation's Agreements confirmed by the 1901 and 1902 Acts was the Creek Nation would lose all jurisdiction over any of its former territory upon completion of allotment (except that expressly retained for the tribe by Congress).

3. Subsequent treatment of the former Creek territory points to disestablishment, satisfying *Solem* step 3.

The Tenth Circuit relied on actions pertinent to remaining trust parcels or convenient geographic references to the "Creek Nation" to term later treatment "inconclusive," ignoring the import of actions that reflect on the far more pertinent question whether tribal governmental authority was deemed to apply across the former Creek territory. *Amici's* members exemplify the widely held understandings that it would not. They have lived, invested, entered commercial arrangements, and structured their conduct in the belief they did so in an area where Oklahoma law, taxation, and dispute resolution unqualifiedly applied. The decision took too superficial a look at the *Solem* step three evidence and inadequately considered later treatment of the former Creek territory by Congress.

As early as 1908, Congress lifted restrictions on alienation of Creek allotted lands, allowing much earlier alienability and application of state law to allotted lands. *See* 35 Stat 312, §§ 6, 8. In 1918, Congress subjected lands of the Five Tribes to "the laws of the State of Oklahoma providing for the partition of real estate," removing from partitioned lands "all restrictions of any character." Act of June 14, 1918, ch. 101, § 2, 40 Stat. 606, compiled at 25 U.S.C. § 355. Reflecting their non-reservation character, in 1926, allotted lands of the Five Civilized Tribes were subjected to Oklahoma State court jurisdiction, including State statutes of limitations. *See* Act of April 10, 1926, § 2, 44 Stat. 239. Further recognizing there were no reservations in Oklahoma, Congress excluded the Creek, and other Oklahoma Tribes, from the application of the landmark Indian Reorganization Act of 1934, *see* Act of June 18, 1934, ch. 576, § 13, 48 Stat. 986, compiled at 25 U.S.C. § 5118, later restoring its application to "any recognized tribe or band of Indians residing in the State of Oklahoma." *See* Act of June 26, 1936, c. 831, § 3, 49 Stat. 1967, compiled at 25 U.S.C. § 5203; *see also, e.g.*, 25 U.S.C. § 1603(16)(B)(i) (defining the term "reservation," for the Indian Health Care Act, to include "former reservations in Oklahoma").[4]

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[4] The decision incorrectly relies on scattered references to the "Creek Nation," which, in context, is plainly a mere "convenient geographical description" to define the geographic area within which prescribed transfers or federal services for the Creek would apply. *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998); *United States v. Okla. Gas & Elec. Co.*, 318 U.S. 206, 216–17 (1943) (concluding the term "reservation" "was used in a geographical and not a legal sense").

The State's unquestioned exertion of jurisdiction over the predominantly non-Indian, nonmember population residing on former Creek Nation lands since 1901 and further, since 1906, strongly supports a conclusion of reservation disestablishment. *See Rosebud Sioux*, 430 U.S. at 604-6; *see also Creek Nation v. United States*, 24 Ind. Cl. Comm. 238, 250 (1970) (on passing acts to dissolve the Creek Nation, "[t]he United States assumed the task of terminating the Nation's mode of life include its manner of holding its lands"). Significantly, the court of appeals failed to consider evidence that the duty of maintaining order and enforcing laws on non-trust lands has resided almost exclusively in the hands of county and State officials, not tribal government. *See Hagen*, 510 U.S. at 421. The expectations of Oklahoma's residents and businesses, including many of *Amici*'s members, would be turned upside down if the decision below is not reversed.

Demographic changes further reinforce the understanding Congress terminated any reservation status of the former Creek Territory. The population of the Tulsa metropolitan area as of the 2010 census was 937,478. *See* U.S. Census Bureau, Quick Facts, Tulsa County, Oklahoma *available at* https://www.census.gov/quickfacts/fact/table/tulsacountyoklahoma/PST045217 (last visited July 22, 2018). The Nation reports 16,257 of its members live in Tulsa County as of 2016. *See* Muscogee (Creek) Nation, Citizenship Board, Facts & Stats, *available at* http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/ (last visited July 23, 2018). Less than one percent of Tulsa County's residents are members of the Nation, and the metropolitan area has developed for more than a century under state authority.

Over a century of unqualified reliance by predominately nonmember residents and businesses in the former Creek territory reflect the intractable "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005). The equitable doctrines that led this Court to conclude in *City of Sherrill* that "long delay . . . and developments in the [area] spanning several generations, . . . render inequitable [a] piecemeal shift in governance," *id.* at 221, appropriately figure in a *Solem* step three analysis on the record presented here. The court of appeals failed to address that extended reliance.

The decision incorrectly dismissed the State's evidence on Congressional intent and later history. As the Court confirmed in *Nebraska v. Parker*, evidence of congressional intent and later treatment figure significantly in the *Solem* analysis, and, while modern treatment of an area alone cannot show disestablishment, finding disestablishment is not solely dependent on clear statutory language. 136 S. Ct. at 1081-82. The Tenth Circuit failed to distinguish between the evidence of later understandings in *Parker*, addressing another prototypical surplus land act, and the unequivocal indications of all participants that the Creek Nation had no remaining reservation.

For decades, ranchers, farmers, oil and gas developers, and companies of all stripes doing business in the former Creek territory have been subject to State jurisdiction for taxation, environmental, and other regulation, and their disputes resolved in State courts. The consequences for the great majority of the population residing within the former Creek territory are far too significant to ignore that long reliance. The

decision below erred in giving too short a shrift to the contemporary and modern understandings of whether the Nation has a reservation that extends to the boundaries of its 1866 territories. The evidence that should be considered at *Solem* steps two and three weighs heavily in favor of disestablishment and, with the clear Congressional language analyzed at *Solem* step one, leaves no conclusion but that the Tenth Circuit erred in reinstating a reservation for the Nation.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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